No. 98-1828

In The

Supreme Court of the United States

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL. JONATHAN STEVENS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT RELATOR JONATHAN STEVENS' BRIEF IN RESPONSE

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STATEMENT OF ISSUES

1. Whether a State is a "person" subject to liability under 31 U.S.C. § 3729(a) of the False Claims Act.

2. Whether the Eleventh Amendment would allow Relator Jonathan Stevens to prosecute a False Claims Act suit against a non-consenting State to remedy an injury to the United States.

PARTIES TO THE PROCEEDINGS BELOW

The parties in the United States Court of Appeals for the Second Circuit were Relator Jonathan Stevens, Intervenor United States of America, and Defendant State of Vermont Agency of Natural Resources.

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STATEMENT OF THE CASE

This matter arises from an appeal of the United States District Court for the District of Vermont's Order denying Petitioner's Motion to Dismiss the Complaint. The Complaint states that the State of Vermont, through its subsidiary administrative agencies, knowingly submitted false claims for federal funding to the United States of America in violation of the False Claims Act, 31 U.S.C. §§ 3729 et seq.

The Vermont Agency of Natural Resources ("the Agency") was the recipient of federal funds at all times relevant hereto. The Agency, through its Department of Environmental Conservation ("DEC") and a subdivision called the Water Supply Division ("WSD"), received grant funds administered by the United States Environmental Protection Agency ("EPA"). The grant funds arose from the various federal environmental protection statutes, including the Clean Water Act, 33 U.S.C. §§ 1251 et seq., and the Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq. The grants provided funds for the WSD's general financial needs for work allegedly performed in connection with the federally sponsored environmental programs.

As recipient of the federal grant funds, the Agency was subject to certain reporting requirements, including the submission of time and attendance records to reflect the actual time worked under the grants. Past expenditures served as the basis for maintaining or increasing assistance in future federal funding applications. The Agency did not follow such procedures, but instead it chose to manufacture its time records for the explicit purpose of ensuring a steady stream of federal funding.

A. PETITIONER MISREPRESENTS THE CLAIMS INITIATED BY RELATOR JONATHAN STEVENS.

Far more than a dispute about accounting practices, Petition at 3, the Complaint alleges that Petitioner fabricated time records for submission to EPA to retain, maintain, and even increase a stream of federal funding for state-administered environmental programs. Implicit in Petitioner's actions is the attempt to retain and/or obtain federal funds to which it was not entitled. *See United States ex rel. Stevens v. Vermont*, 162 F.3d 195, 202 (2d Cir. 1998), App. at 6-7 (setting forth the allegations in the Complaint).

In addition, this action is an appeal from the denial of a motion to dismiss. Petitioner has not answered the Complaint; nor has any discovery occurred. Accordingly, Petitioner's statement on page 3 of its Petition that the EPA "has no complaint with Vermont's administration of these grants" or any similar statement about the ultimate merits of the case is premature and reflects unsubstantiated factual assertions from outside the record. Respondent Jonathan Stevens is fully prepared to discuss the merits of the action, but a factual debate without an evidentiary record would be inappropriate given the procedural posture of this case.

Relator Jonathan Stevens was employed as an attorney with the WSD. To ensure that federal grant money is spent on federally-sponsored projects, the WSD is required to account for the actual time spent working on the grants. During the course of his employment, officials of the Agency and the WSD demanded that Mr. Stevens sign time records for submission to the EPA that the WSD

had fabricated to reflect that the grants were being spent. Employees of the DEC, like Mr. Stevens, did not work the hours arbitrarily assigned to them; nor did they record the time they actually worked under the federal grants to which their time was allocated.

The Agency knowingly and continuously submitted false claims to the federal government for salary and wage expenses based on the fictional time records. As a result of this practice, the time records reflected that the DEC had completely exhausted the federal grant money in connection with federal projects, thereby ensuring that: (1) the funds actually received could be retained by the Agency, and (2) the DEC could maintain or increase its grant funding in subsequent years. *See* App. at 5-7. Mr. Stevens and other DEC employees complained internally that they were required by management to submit false time records. Despite these complaints, DEC management continued its practice of requiring employees to sign false time records.

Petitioner submitted falsified time records to the federal government for the explicit purpose of retaining, maintaining, and potentially increasing an income stream of federal funds into the State of Vermont to which it was not entitled. Due to its administrative procedures, Petitioner does not know and cannot contend that the work reflected in its records, for which it obtained the federal funds, was ever undertaken. In short, this case is not merely about accounting practices; it is about a grant recipient's calculated efforts to manipulate time and expense records to maintain federal funding sources.

On May 26, 1995, Mr. Stevens filed suit, under seal, against the State of Vermont pursuant to the False Claims Act. *See* App. 94-95. The United States of America declined to intervene on June 27, 1996, and, on July 30, 1996, the District Court lifted the seal. The Complaint was served on the State of Vermont on November 7, 1996. Petitioner moved to dismiss the case, and the district court denied the motion on May 9, 1997. Petitioner's motion to reconsider was also denied. Petitioner subsequently filed its appeal of the district court's decision to the Second Circuit Court of Appeals. On December 7, 1998, the Second Circuit upheld the district court's decision. Petitioners filed a request for reconsideration and rehearing *en banc*, which was rejected. The present petition to this Honorable Court for a Writ of Certiorari followed the denial of reconsideration.

REASONS FOR THE PETITION

A. THE FEDERAL CIRCUIT COURTS ARE IN CONFLICT OVER BOTH QUESTIONS PRESENTED.

A conflict exists between the Federal Circuit Courts of Appeals over whether: (1) sovereign immunity bars this action, and/or (2) States are "persons" subject to False Claims Act liability. Presently, six Federal Circuit Courts of Appeal have decided one or both questions. States are subject to False Claims Act liability in the Second, Fourth, Eighth, and Ninth Circuits. The Second Circuit decided that Petitioner's constitutional and statutory construction defenses are without merit. *See United States ex rel. Stevens v. Vermont Agency of Natural Resources,*

162 F.3d 195 (2d Cir. 1998). The Eighth Circuit decided in separate cases that neither defense barred a relator's suit. *See United States ex. rel Rodgers v. Arkansas,* 154 F.3d 865 (8th Cir. 1998) (holding that sovereign immunity does not apply to False Claims Act suits); *United States ex rel. Zissler v. Regents of the Univ. of Minnesota,* 154 F.3d 865 (8th Cir. 1998) (holding that States are "persons" subject to liability under the False Claims Act). The Fourth and Ninth Circuit Courts of Appeal have decided that the Eleventh Amendment does not prevent *qui tam* relators from bringing actions against States on behalf of the United States. *See United States ex rel. Berge v. Bd. of Trustees of the Univ. of Ala.*, 104 F.3d 1453 (4th Cir. 1997); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957 (9th Cir. 1994), vacated on other grounds, 72 F.3d 740 (9th Cir. 1995).

In contrast, the D.C. Circuit and the Fifth Circuit courts have ruled, on separate grounds, that a realtor cannot sue the States under the False Claims Act. The Fifth Circuit concluded in *United States ex rel. Foulds v. Texas Tech Univ.*, No. 97-11182, 1999 WL 170139 (5th Cir. Mar. 29, 1999) that sovereign immunity barred suits initiated by private citizens pursuant to False Claims Act's *qui tam* provisions, and the D.C. Circuit ruled recently in *United States ex rel. Long v. SCS Business and Technical Inst., Inc.*, Nos. 98-5133, 98-5149, 98-5150, 1999 WL 179713 (D.C. Cir. April 2, 1999) that States are not "persons" subject to liability under the statute.

1. SOVEREIGN IMMUNITY

The Second Circuit rejected Petitioner's contention that the Eleventh Amendment bars actions to remedy injuries to the United States against States brought by *qui tam* relator, reasoning that:

> The real party in interest in a *qui tam* suit is the United States. All of the acts that make a person liable under § 3729(a) focus on the use of fraud to secure payment from the government. It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure for the damages that are to be trebled; and it is the government that must receive the lion's share – at least 70% – of any recovery. To be sure, the *qui tam* plaintiff has an interest in the outcome, but his interest is less like that of a private party than that of an attorney working for a contingent fee. *Qui tam* claims simply do not seek the vindication of a right belonging to a private plaintiff, and if there has been no injury to the United States, the *qui tam* plaintiff cannot recover.
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> In sum, although *qui tam* actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the public at large, the Government remains the real party in interest in any such action.
>
> Further, . . . , the government has the right to control the action. If it wishes to intervene in the action at the outset, the *qui tam* plaintiff cannot prevent it from doing so. Whether or not the government intervenes, it has the right to be kept abreast of discovery in the *qui tam* suit and

> the right to prevent that discovery from interfering with its investigation or pursuit of criminal or civil suit arising out the same facts. If the government intervenes, it takes control of the lawsuit; it may have the participation of the *qui tam* plaintiff limited; and it is not bound by any act of the *qui tam* plaintiff. The government has both the right to prevent a dismissal sought by the *qui tam* plaintiff and the right to cause the action to be dismissed for any rational governmental reason, notwithstanding the *qui tam* plaintiff's desire that it continue.
>
> In light of the fact that *qui tam* claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits, we conclude that such a suit is in essence a suit by the United States and hence is not barred by the Eleventh Amendment.

App. at 16-17 (inner citations and inner quotations omitted).

In view of the basic design of the False Claims Act as a remedy for fraud committed on the United States of America (and thereby the citizens of the fifty states), the Second Circuit concluded that sovereign immunity does not apply to the suit based on a fundamental principle of constitutional law:

> As against the United States, . . . , States have no sovereign immunity. When the States, in framing and adopting the Constitution, agreed to create a federal government established for the equal benefit of the people of all the States, they necessarily recognized that the

> privilege of immunity would be inconsistent with the government's paramount sovereignty. A permanent waiver of the State's immunity from suit by the United States is inherent in the constitutional plan. In sum, nothing in the Eleventh Amendment or in any other provision of the Constitution prevents a State's being sued by the United States.

App. at 15 (inner citations and inner quotations omitted).

The Second Circuit's holding is consistent with the views of the majority of federal circuits that have confronted the defense. The majority opinion in those courts is that the Eleventh Amendment defense is a "red herring" because the United States is the real party in interest in a False Claims Act suit. *See Rodgers*, 154 F.3d at 868; *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1458-59 (4th Cir.), cert. denied, 118 S.Ct. 301 (1997); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 962-63 (9th Cir. 1994), vacated on other grounds, 72 F.3d 740 (9th Cir. 1995) (en banc); *see also United States ex rel. Milam v. Univ. of Texas*, 961 F.2d 46, 50 (4th Cir. 1992).

Despite the consistency of the other Courts of Appeal on the issue of sovereign immunity, the Fifth Circuit recently reached the contrary conclusion. *See United States ex rel. Foulds v. Texas Tech Univ.*, No. 97-11182, 1999 WL 170139, at *7-10 (5th Cir., Mar. 29, 1999). Downplaying the source of the injury and the related position of the United States as the real party in interest, the Fifth Circuit decided that the Eleventh Amendment prevents any and all suits "commenced or prosecuted" by private citizens against a State. *Id.* In essence, the Fifth Circuit concluded

that the Legislature and the Executive are constitutionally restrained by the Eleventh Amendment from enlisting private citizens to pursue claims of fraud committed on the United States. *Id.* Based on the Eleventh Amendment and dicta found in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) to the effect that Congress cannot delegate its authority to sue a state to a private person, the Fifth Circuit held that only federal officers can initiate suits against States. Thus, the Fifth Circuit concluded "that when the United States has not actively intervened in the action, the Eleventh Amendment bars *qui tam* plaintiffs from instituting suits against the sovereign states in federal court." *United States ex rel. Fould*, 1999 WL 170139 at *10. Consistent with the views of the Fifth Circuit, the D.C. Circuit has also stated that it has reservations whether the Eleventh Amendment prevents suits by private relators. *See United States ex rel. Long*, 1999 WL 178713, at *12-13.

In sum, Respondent Jonathan Stevens agrees that a conflict exists amongst the Circuit Courts of Appeal on whether the Eleventh Amendment applies to suits against States instituted by private relators on behalf of the United States under the False Claims Act.

2. STATES AS "PERSONS" SUBJECT TO FALSE CLAIMS ACT LIABILITY.

The Second Circuit concluded that States are proper defendants under the False Claims Act in *United States ex rel. Stevens*. App. at 19-30. In particular, the Second Circuit held that under traditional rules of statutory construction, States are "persons" subject to liability under

the Act. *Id.* In so holding, the Second Circuit declined Petitioner's urging to apply the "plain statement" rule set forth in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989). App. at 19-20.

The Second Circuit instead concluded that: "States have no right of authority, traditional or otherwise, to engage" in fraud. Thus, there was nothing inherent in acts of fraud committed by a State which, if regulated by a federal statute, would "upset the usual constitutional balance of federal and state powers" such that a literal identification of States as "persons" is required in the statute before they could be considered as False Claims Act defendants. Instead, the Court applied the long accepted rule of statutory construction set forth in *United States v. Cooper*, 312 U.S. 600, 604-05 (1941), that:

> although "in common usage[ ] the term 'person' does not include the sovereign, . . . there is no hard and fast rule of exclusion." *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941). "Whether the term 'person' when used in a federal statute includes States cannot be abstractly declared, but depends upon its legislative environment." *Sims v. United States*, 359 U.S. at 112; *see Georgia v. Evans*, 316 U.S. 159, 161 (1942). "The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring [a] state . . . within the scope of the law." *United States v. Cooper Corp.*, 312 U.S. at 605.

App. at 21.

Based on the principle of statutory construction set forth in *Cooper*, the Second Circuit recognized that: (1) the legislative history, including the Senate Report, indicates that States are "persons" under the False Claims Act; (2) the States' status as potential False Claims Act relators under the liability provisions meant that they were also potential defendants; (3) the civil investigative demand provisions specifically include States in its definition of "persons" subject to investigation for False Claims Act violations; and (4) the legislative history for the original act specifically indicated that the Legislature was concerned about fraud committed by State officials when the statute was originally adopted in 1863. App. at 20-30. Such evidence, viewed in context of the statute's broad remedial purpose to reach all types of fraud committed on the federal government, led the court to conclude that States are subject to False Claims Act liability. App. at 21-30. Accordingly, the Second Circuit held:

> . . . the term "[a]ny person" in § 3729(a) is sufficiently broad to encompass the States; that Congress meant to include the States within the term "person" in § 3730(b)(1), allowing them to bring suits under that section as *qui tam* plaintiffs; that there is no indication in the language or in the legislative history that Congress ascribed different meanings to the term "person" as used in §§ 3720(a), 3730(a), and 3730(b)(1); and that Congress intended the false-claims statutes to permit suits under §§ 3730(a) and 3730(b)(1) against any entity that presented false monetary claims to the government. We thus conclude that the present suit is authorized by the FCA.

App. at 30.

Indeed, the Second Circuit's holding exists the previous decision by a sister circuit in *United States ex rel. Zissler*, in which the Court of Appeals for the Eighth Circuit held that "a False Claims Act action against a State falls within 'the usual constitutional balance between the States and the Federal Government.'" 154 F.3d at 874 (quoting *Will*, 491 U.S. at 65).

The Eighth Circuit also rejected the State defendant's arguments based upon State/Federal balance, concluding that:

> As the real party in interest, the federal government's power to sue a State is well within the usual constitutional balance of federal and state powers. The consent of the States to suit by the United States is 'inherent in the [plan of the constitutional] convention,' *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991), and 'nothing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever seriously supposed to prevent a State's being sued by the United States.' *United States v. Mississippi*, 380 U.S. 44 (1936).
>
> * * *
>
> Therefore, Congress's intent to include States as liable parties need not be manifest in 'unmistakably clear' language.

Id. at 873-74.

In contrast to the holdings of the Second and Eighth Circuits, the D.C. Circuit recently concluded that States are not persons subject to False Claims Act liability. *See United States ex rel. Long*, 1999 WL 178713, at *3-17. In so holding, the D.C. Circuit concluded that *Will's* "plain

statement" rule required that Congress make its intent unmistakably clear if it intended the False Claim Act is to apply to States. The court also rejected the conclusion that the False Claims Act, if applied to States, does not interfere with essential State functions or alter the usual constitutional balance of Federal and State power. According to the D.C. Circuit, the False Claims Act as currently written or as originally adopted does not precisely define the word "person;" thus, there was no clear statement of State liability under the statutes sufficient to satisfy *Will*. *Id.* Finding that no clear statement of congressional intent existed in the statute, the D.C. Circuit held that States are not subject to False Claims Act liability. *Id.* 15-17.

In sum, Respondent agrees with Petitioner that a clear conflict exists between the Circuit Courts of Appeal on the issue of whether States are "persons" subject to False Claims Act liability. There is no way to reconcile the decisions rendered in the Second, Eighth, and D.C. Circuits concerning whether a State can be sued under the statute.

B. THIS CASE RAISES NO QUESTIONS "GOING TO THE HEART OF FEDERAL-STATE RELATIONS".

Notwithstanding Petitioner's contentions about disruption of the "state/federal balance of power," the true controversy presented by this appeal is whether the federal government (and thus the people of the fifty states) will retain a remedy against individual States, State university systems, State administrative agencies, and State research organizations for fraud committed on the public

fisc. As noted by both the Second and Eighth Circuit Courts of Appeal, there is no inherent constitutional right, role, or core function served by a State that constitutionally and categorically permits it to defraud the citizens of the United States. As stated by the Eighth Circuit Court of Appeals:

> Nor does application of the False Claims Act to State constitute coercion, thereby disrupting the usual balance of power between the United States and the States. There is no coercion in subjecting the States to the same conditions for federal funding as other grantees: States may avoid these requirements simply by declining to apply for and to accept these funds. But if they take the King's shilling, they take cum onere. . . . Here, the only cooperation asked of a State is honesty, ... Accordingly, we reject the [State defendant's] suggestion that the False Claims Act's remedies impermissibly commandeer the legislative processes of the States. Furthermore, the [State defendant] should not have needed explicit notice of the basic understanding that the grants were to be obtained and administered without fraud.

United States ex rel. Zissler, 154 F.3d at 873 (inner citations and inner quotations omitted).

In sum, while Respondent agrees with Petitioner that conflict exists in the Circuit Courts of Appeal concerning the issues stated in this appeal, Respondent strongly disagrees that subjecting a State to False Claims Act liability for fraud somehow disrupts the traditional, constitutional

balance of power between States and the Federal government.

CONCLUSION

Respondent Jonathan Stevens agrees that a conflict exists between the Federal Circuit Courts of Appeal regarding both the issue of sovereign immunity and the statutory construction arguments raised by Petitioner. In that respect, Respondent agrees that this case warrants a decision by this Honorable Court. Respondent respectfully disagrees that this case involved substantial issues related to the balance of State and Federal constitutional powers.

Dated: May 26, 1999

Respectfully submitted,

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